

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Fairclark Cable TV, Inc.,)	
d/b/a Time Warner Cable)	CSR 6001-E
)	
Petition for Determination of Effective)	
Competition in the Harrison County, West)	
Virginia, WV0373)	

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 2003

Released: July 7, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Fairclark Cable TV, Inc., d/b/a Time Warner Cable (“Time Warner”) has filed with the Commission a petition alleging that Time Warner’s cable system serving the unincorporated portions of Harrison County, West Virginia (“franchise area”) is subject to effective competition from competing service providers. Time Warner alleges that its cable system is subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended (“Communications Act”),¹ and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission’s rules.² Time Warner bases its allegation of effective competition on the competing services provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and DISH Network (“DISH”), and other cable providers. The Public Services Commission (“PSC”) of West Virginia filed a response to the petition. In the response, the PSC complained it was not properly served by Time Warner and requested additional time to determine whether to respond to allegations in the petition. The PSC did not file an additional response.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 76.905 of the Commission’s rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record in this proceeding, Time Warner has met this burden.

¹ 47 U.S.C. § 543.

² 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(2).

³ 47 C.F.R. § 76.906.

⁴ 47 C.F.R. § 76.905.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁵

4. Turning to the first prong of the competing provider test, we find that the programming of DBS providers DirecTV and DISH satisfies the Commission's programming comparability criterion. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁶ Time Warner submits that the large number of DBS subscribers in the franchise area demonstrates that potential subscribers are reasonably aware of their ability to obtain DBS service.⁷ With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.⁸ We find that Time Warner has demonstrated that the franchise area is served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Time Warner also demonstrated on this record that the two DBS providers are physically able to offer MVPD service to subscribers in the franchise area, that there exists no regulatory, technical, or other impediments to households within the franchise area taking the services of the DBS providers, and that potential subscribers in the franchise area have been made reasonably aware of the MVPD services of DirecTV and DISH.⁹ Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area.¹⁰ Time Warner sought to determine the competing provider penetration by purchasing a franchise-specific zip code plus four subscriber report from SkyTrends that identified 1,762 DBS subscribers in the franchise area.¹¹ Time Warner also claims that there are three other cable systems in the franchise area that have a total of 3,755 subscribers.¹²

6. Turning to the competitive penetration level in the franchise area, Time Warner asserts that it is the largest MVPD because its subscribers outnumber the aggregate DBS subscribership and each of the cable competitors in the franchise area.¹³ Time Warner calculates that there are 13,081 households

⁵ 47 U.S.C. §543(l)(1)(B); *see also* 47 C.F.R. §76.905(b)(2).

⁶ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁷ Time Warner Petition at 4.

⁸ *See* 47 C.F.R. § 76.905(g).

⁹ Time Warner Petition at 4 - 5.

¹⁰ 47 USC § 543(l)(1)(B)(ii).

¹¹ Time Warner Petition at 6 and Exhibit B.

¹² Time Warner submits that Turner Enterprises d/b/a Laurel TV Cable has 212 subscribers, FinCom Corporation d/b/a West Virginia County Cable has 435 subscribers, and Alliance Partnership, LLP d/b/a Cablevision has 3,108 subscribers. *Id.* at Exhibit B.

¹³ *Id.* at 9.

in the franchise area.¹⁴ Time Warner determined the number of households by using Census 2000 data and subtracting the households in incorporated parts of the county from the total number of county households.¹⁵ Time Warner calculates the percentage of households subscribing to multichannel video programming distributors other than the largest to be 42.18 percent.¹⁶

7. We find that Time Warner's calculation of the number of households and the number of DBS subscribers in the franchise area is supportable by the evidence in the record. The evidence is not as apparent regarding non-Time Warner cable subscribers in the franchise area. Time Warner's estimate is based on cable operator submissions to the PSC. We cannot determine from the submission of Alliance Communications Partners which of its subscribers are in the incorporated areas and which are in the unincorporated areas of Harrison County. Nonetheless even if those subscribers are not included, we still calculate the competing provider penetration rate in the franchise area to be 18.4 percent.¹⁷ We find that Time Warner has demonstrated that the number of households subscribing to programming services offered by providers, other than the largest MVPD, exceeds 15 percent of the households in the franchise area.

8. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable system serving the unincorporated portions of Harrison County, West Virginia is subject to effective competition.

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Fairclark Cable TV, Inc., d/b/a Time Warner Cable **IS GRANTED**.

10. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁸

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

¹⁴ *Id.* at 7.

¹⁵ Time Warner Petition at Exhibit B (27,867 total households – 14,786 households in incorporated areas = 13,081 franchise households).

¹⁶ 1762 DBS subscribers + 212 Turner Enterprises cable subscribers + 435 FinCom Corp. cable subscribers + 3108 Alliance Communications Partners cable subscribers ÷ 13,081 franchise area households = 42.18%.

¹⁷ 1762 DBS subscribers + 212 Turner Enterprises cable subscribers + 435 FinCom Corp. cable subscribers ÷ 13,081 franchise area households = 18.4%.

¹⁸ 47 C.F.R. § 0.283.